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No. 339

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1968.

JOE EDWIN MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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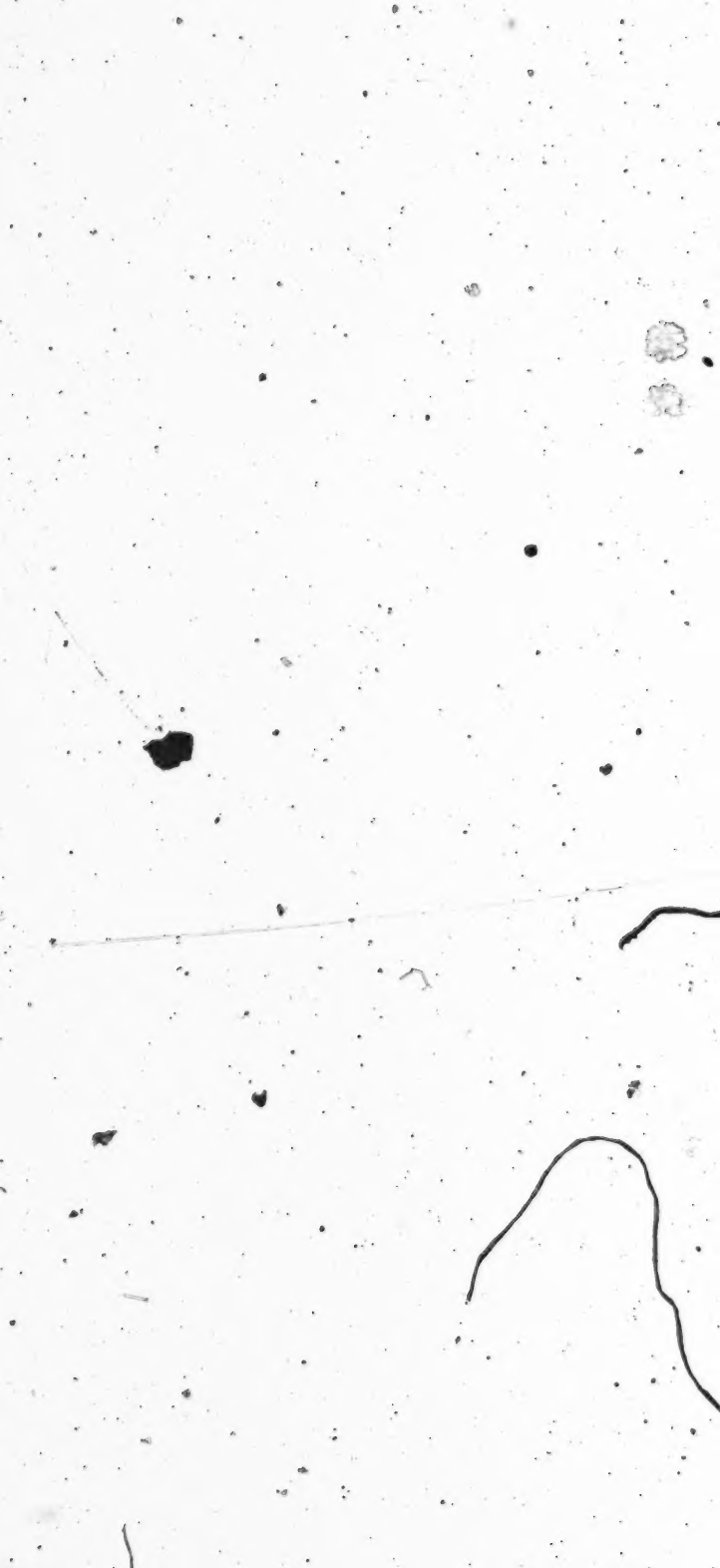

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No.

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Chief Justice Of The United States And The Associate Justices Of The United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment of the United States District Court for the Southern District of Indiana finding petitioner guilty of the crime of receiving goods stolen from an interstate shipment in violation of Title 18, United States Code, Section 659 and sentencing him to a term of one year (ten months of which were suspended) and fining him in the amount of Twenty-Five Hundred Dollars ($2500.00).

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the instant case was unreported as of the date that this petition was sent to the printer. A copy of the opinion is hereto annexed in Appendix A. A Petition For Rehearing was filed and denied as is shown by Appendices B & B-1.

STATEMENT OF JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 24, 1968. A petition for rehearing was then filed within the time allowed by the rules of the said lower court and the same was denied on June 26, 1968.

The statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Government and each of its branches bears the same obligation to afford equal protection of the law to each of its citizens that the Supreme Court of the United States has found to exist with respect to the several states in its interpretation of the Fourteenth Amendment to the Constitution of the United States which appears in its decisions in *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Lane* v. *Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963).

2. Whether Rule 17d of the United States Court of Appeals for the Seventh Circuit in the context of the other rules of the said Court denies equal protection of the law on the basis of economic status.

3. Whether the question of sufficiency of the evidence to sustain a conviction may be raised in a Federal Criminal appeal and, if so, whether due process of law is afforded where such an attempt by a criminal appellant is dismissed, without consideration as "absurd."

4. Whether due process is afforded a citizen where he is convicted and sentenced to prison solely on the basis of evidence that he purchased goods which were stolen and which happened to have been stolen from an interstate shipment without a scintilla of evidence showing awareness of a federal harm.

5. Whether the rights of a citizen against unreasonable search and seizure can be voluntarily waived by a citizen who is confronted with four F.B.I. agents who appear at his front door and identify themselves as F.B.I. agents and ask "May we come in?"

CONSTITUTIONAL PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

Constitution of the United States, Amendment 4.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use without just compensation.

Constitution of the United States, Amendment 5.

USAGES BEING QUESTIONED

It shall not be necessary to print the record on appeal or on review. All appendices, briefs, or other papers printed for the use of the court, if produced by ordinary typographic methods, must be in such form and size that they can be conveniently bound together so as to make an ordinary octave volume having pages 6 1/8 X 9 1/4 inches and type matter 4 1/6 inches by 7 1/6 inches, except that appendices and briefs in patent cases may be printed in such size as is necessary to utilize copies of patent documents: viz., 7 ½ by 10 inches. They and all parts thereof, including index, list of authorities, footnotes and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type adequately leaded; and the paper must be opaque and unglazed.

Rule 17f, United States Court of Appeals For The Seventh Circuit.

In lieu of submitting a printed appendix or brief as prescribed by Rule 16 (a) and (f), a party may, at his option, reproduce the appendix or his brief or both by multigraph or offset duplicating method. The record and brief so produced shall be on opaque unglazed paper, size 7½ X 10 inches, with margins of at least 1 inch, except that the left-hand margin shall be 1½ inches. No volume shall contain more than 300 pages. Each volume shall be neatly stitched on the left-hand side and have a cover on both front and back. Type matter shall be double-spaced except for quotations, which may be single spaced and indented. The clerk shall refuse to accept for filing any copies which are not clear and readable.

Rule 17g, United States Court of Appeals For The Seventh Circuit.

Unless permission is obtained from the court or a member thereof, the clerk will not receive a brief of either party of more than 75 pages. The parties shall be referred to as "plaintiff" and "defendant".

Rule 17d, United States Court of Appeals For The Seventh Circuit.

STATEMENT OF THE CASE

Petitioner was indicted on June 9, 1966 by the Grand Jury for the Southern District of Indiana on a charge of violating Title 18, United States Code, Section 659. On July 28, 1966 petitioner was arraigned and then on August 2, 1966 he filed a Motion To Suppress Evidence which subsequently was heard and overruled. Then, on January 18, 1967 the petitioner was tried before a jury which returned a verdict of guilty. A timely appeal was then taken to the United States Court of Appeals for the Seventh Circuit and, two days before the filing of the petitioner's Appellant's Brief the petitioner filed a Petition For Permission To Dispense With Rule 17d And Combine Appendix and Brief which read as follows with the caption and title excluded:

> Comes now the petitioner in the above entitled cause, by Counsel, and respectfully moves the Court for permission to dispense with Rule 17d for the reason that the Brief will be rather voluminous because there are constitutional questions involved in said appeal which are more extensive than were anticipated, and as a result thereby, said Brief will be in excess of 75 pages; that the best estimate of Counsel is that the Brief will be of the approximate length of 100 pages. Petitioner further says that said Brief is on the merits and presents substantial questions of law and that the petition herein is not frivolous.
>
> Counsel for Petitioner further says that it will be more expeditious and will result in greater clarity

in the preparation of said appeal if said Court will allow said Appendix and Brief to be in a single volume, and Counsel further respectfully prays the Court for permission to embody the Appendix and Brief in a single volume in this appeal.

That the submission date for the Brief and Appendix in this cause is January 27, 1968, and Counsel respectfully prays the court for a ruling hereon at the earliest possible time so that appropriate arrangements can be made herein.

In response to the above-quoted motion the Seventh Circuit entered an order to the following effect:

> IT IS HEREBY ORDERED that the petition of counsel for defendant-appellant for permission to dispense with Rule 17d and combine appendix and brief, filed herein on January 8, 1968 be and the same is hereby *denied.* (Emphasis not supplied)

The aforesaid ruling of the United States Court of appeals was entered in January 10, 1968. Subsequent to said order the following Verified Petition To Dispense With Rule 17d was filed by the petitioner, through counsel:

> Appellant by counsel, respectfully moves this Honorable Court for permission to dispense with Rule 17d with reference to the length of the main brief and would respectfully show this Honorable Court that he had heretofore filed in this Court, a Petition For Permission to Dispense With Rule 17d with reference to the combining of the brief and appendix, but that the same was on January 10, 1968, denied.
>
> Counsel would further represent to this Honorable Court that due to the pressure and volume of other appeals in this Court, namely, the main brief in a cause entitled "United States of America v. Sidney Rowlette and Robert Vecelli" and another appeal in a cause entitled "United States of America v. Robert Vecelli," both causes being appealed from the United States District Court for the Northern District of

Illinois, Eastern Division, Chicago, Illinois, plus a main brief just recently completed for the Tenth Circuit, Denver Colorado, in a cause entitled "United States of America v. Sidney Rowlette", that there has been great confusion and uncertainty because of the preparation of the briefs and the printing of the same with reference to the number of pages in the instant appeal of Joe Edwin Miller and that Counsel just found out this 24th day of January, 1968, by information obtained from J/W Printing, Red Jenkins, President, at the printing establishment at 1417 N. Illinois Street, Indianapolis, Indiana, that the length of the main brief in this instant cause is in excess of 75 pages which fact can be corroborated by Bertha Jones, the chief legal secretary of Counsel.

That this information just came to the attention of Counsel who for the past three days was busily engaged in litigation in the United States District Court for the Southern District of Indiana, Indianapolis, Division in a 2255 Petition entitled Donald Allen Kiger v. United States of America and which was just completed on this 24th day of January, 1968 at approximately 1:45 P.M. and that this is the first time this information was imparted to Counsel.

That Counsel makes this request at the earliest possible time after the discovery of the same.

That this Motion To Dispense With Rule 17d is not frivolous, that substantial questions are being presented and raised in this appeal and that it would work irreparable damage and hardship and would be most injurious to Defendant-Appellant Miller if this motion were not granted because there is not sufficient time to prepare another brief, and/or the printing thereof, in sufficient time because the date of the filing of this brief is Friday, January 26, 1968.

WHEREFORE, William C. Erbecker, as Attorney for Joe Edwin Miller, respectfully prays this Honorable Court, because of the emergency features of this case, to permit Defendant-Appellant and Counsel to dispense with Rule 17d and to permit the filing of

a brief in excess of 75 pages for the reasons hereinabove set out.

Then on January 26, 1968, the United States Court of Appeals for the Seventh Circuit made the following entry in its record:

> On consideration of the verified petition of counsel for defendant-appellant to dispense with Rule 17d with reference to the length of the main brief of defendant-appellant filed herein on January 26, 1968, it coming to the attention of the Court that the attorney for the defendant-appellant has disregarded the previous order of this Court dated January 10, 1968, denying said attorney's request to file a brief for the defendant-appellant in excess of seventy-five (75) pages, the petition to dispense with Rule 17d, (counsel having tendered for filing a brief of 150 pages) is taken with the case to be considered at the oral argument. However, said brief now tendered for filing is ordered filed provisionally, and the United States of America, plaintiff-appellee, shall have thirty (30) days to file an answer brief unless said time is extended.

Then, on May 24, 1968, the Seventh Circuit rendered its opinion in this cause which appears hereinafter in Appendix A. Thereafter the petitioner filed his Petition For Rehearing which appears hereinafter in Appendix B, calling to the Seventh Circuit's attention the fact that its opinion showed on its face a total disregard of the arguments presented in the Petitioner's main brief relating to the petitioner's rights under the Fourth Amendment to the Constitution of the United States and his right to have an appellate adjudication on the question of whether a prima facie case has been presented against him at the trial. The Petition For Rehearing was denied on June 26, 1968 and this attempted appeal is taken from that denial and the prior decision herein.

REASONS FOR GRANTING THE WRIT

It is no overstatement to say that the petitioner's main contentions on his direct appeal were summarily disposed of without discussion on the merits in the written opinion of the Seventh Circuit. It would be difficult to hypothesize a disposition more summarily executed than the disposition of the petitioner's contention that a prima facie case was not presented against him in the trial court:

> We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court. The judgment of conviction is affirmed.

The above-quoted portion of the Seventh Circuit's opinion was a mere repetition of what had been stated by the Government in its main brief as is shown hereinafter in Appendix B. The Seventh Circuit's conclusion apparently was reached without benefit of the argument in the petitioner's main brief because of the "defect" which the Seventh Circuit found in the lengthiness of said brief.

For from being "absurd" the Petitioner's contention that his conviction was based upon mere suspicion with respect to the requisite element of intent where there is no evidence or even attempted proof that there was scienter of the federal harm directed itself to a question which long has been a matter of conflict between the circuits.

> One of the main assignments of error is that the evidence was insufficient to connect these three defendants with the conspiracy, and with knowledge that the stolen cars involved were, or were to be trans-

> ported in interstate commerce. . . . There are a number of circumstances which would lead to the suspicion that both Linde and Brown knew that the cars sold or trusted to them were stolen cars, but it does not appear that they knew whence they came or were to come. . . . That they may have had guilty knowledge and participation rests upon suspicion only.
>
> *Linde* v. *United States,* 13 F.2d 59 (8th Cir. 1929)

> We are unable to reconcile the case of Linde v. United States, 13 F.2d 59 (South Dakota) with either the statute above quoted or the cases of Katz v. United States (C.C.A.) 281 F 129 (Ohio), Rosen v. United States, (C.C.A.) 271 F 651 (N.Y.) and Kasle v. United States (C.C.A.) 233 F. 878 (Ohio). Under the statute and these last named cases, if appellant had been charged with having received a stolen automobile which was moving in interstate commerce, knowing the same to have been stolen it would not have been necessary to allege or prove that he knew it was a part of interstate commerce.
>
> *Wilkerson* v. *United States,* 41 F.2d 655, 656 (7th Cir. 1930)

To be sure, the question on sufficiency presented by the petitioner's main brief previously had been decided in the Seventh Circuit by an affirmative answer to the legal question of whether a participant in a federal property violation must have scienter with respect to the federal nature of the offense before he can be guilty of the offense. But it has been decided to the contrary in other circuits and it has, since the *Wilkerson* case, been resolved to the contrary by leading authorities.

> The federal government may not punish offenses except those which affect areas within its constitutional control just as it may not punish a larceny merely because that physical act is harmful to society. . . . It

must be a "general federal danger rationale and anti-federal intent is therefore required. This argument is based upon the assumption that the reason for punishing must be the basis of jurisdiction to punish 72 Harvard Law Review 938.

The conviction of the petitioner herein was based upon the fact that he purchased a color television set which was brand new and still in the packing crate, paying far below the wholesale price and having it delivered to his home late at night. There was no attempt at proving that he knew from whence the television set came or that he had reason to believe that it came from an interstate shipment, the necessary element to render the matter federal. The proof was directly only to the question of whether he knew or realized that the television set was or must have been stolen.

It is submitted that the foregoing question was a very substantial one and that the Seventh Circuit's characterization of it as "absurd" on the basis of that characterization appearing in the government's circumloquitious brief within even a perusal of the petitioner's main brief because of its length constituted a denial of procedural due process of law unless there was an adequate reason for the Seventh Circuit to decline to consider the petitioner's main brief. The question of whether the Seventh Circuit had such an adequate reason is discussed hereinafter.

With respect to the question of whether the petitioner's rights under the Fourth Amendment to the Constitution of the United States had been violated the holding of the Seventh Circuit in effect was that there is no violation implicit where there is a consent search notwithstanding the fact that consent was obtained by having no less than four F.B.I. agents appear at the petitioner's front door, unannounced and asking for consent. The petitioner's con-

tention was and is that a verbal expression of consent is meaningless in a situation which necessarily is intimidating.

> A layman may not fiind it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon.
>
> *United States* v. *Di Re*, 332 U.S. 581, 68 S.Ct. 222, 228.

If certiorari is granted herein the Petitioner will urge the proposition of law that it is intimidating per se for more than two police officers to approach an individual at his home and request consent to a search.

The preceeding presentation is primarily for the purposes of demonstrating that the petitioner did present substantial questions to the Seventh Circuit in his direct appeal and that the denial of the petitioner's right of allocution by and through his main brief was a denial which seriously effected his rights and which should require reversal if there was no reasonable basis for justifying the said denial.

The aforesaid denial was based upon the rules of the Seventh Circuit which are set forth in the "Usages Being Questioned" portion of this petition. It was demonstrated to the Seventh Circuit in the Petition For Rehearing that the form of the petitioner's brief enabled him to place only half as many words on each page of his brief as could have been printed on the more expensive type of brief (See Appendix B) and that his entire brief would have been within the rules of the Seventh Circuit if the brief had been printed by the more expensive process. The Seventh Circuit persisted in its denial of allocution notwithstanding the aforesaid presentation.

Petitioner believes it to be self-evident that Rule 16g of the Seventh Circuit which provides for the filing of typewritten briefs was adopted for the purpose of providing appellants of less than average means who are not paupers with the opportunity to present their appeals to that court the same as appellants of average or better than average means. The necessity for this alternate means of publishing a brief is readily apparent in view of the decision of this Court for *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

The rules of the Seventh Circuit which are set forth in the "Usages Being Questioned" portion of this petition, by limiting both types of brief to the same number of pages and requiring that all typing except quotes be double-spaced, require any appellant who cannot afford to have his brief published by the more expensive method to limit his argument to half the length of the argument which could be presented by an appellant of average means or which inevitably is presented by the government in criminal appeals because the government's briefs always are printed. Thus, these rules limit a criminal appellant's argument to half the length of the government's argument unless the criminal appellant is, himself, financially able to match the government's resources.

Petitioner recognizes that the equal protection clause of the United States Constitution upon which this Court's decision in *Griffin* v. *Illinois*, supra, is based applies only to the states and not to the federal government. But it is submitted that the Ninth Amendment to theUnited States Constitution which provides that "The unumeration in the constitution, of certain rights, shall not be construed to

deny or disparage others retained by the people" renders *Griffin* v. *Illinois* as applicable to the federal judicial system as it is to the state judicial system and when the said amendment is taken together with a reading of the Constitution as a whole, the fact that the Constitution shows no inclination to permit greater federal discretion in matters affecting the rights of individuals than is afforded to the states compels the conclusion that the federal government, including its courts, is as much obligated to provide equal protection to criminal defendants of different economic means as the states. In recognition of this, much has been done by the federal judiciary and by Congress to protect pauper defendants from being deprived of their rights by their impecunious state, but little or no need has been given to the problems of those who, while they are not paupers, necessarily must economize in undertaking an appeal. Rule 16g of the United States Court of Appeals for the Seventh Circuit, insofar as it provides an alternate and cheaper form for publishing a brief in an appeal to this Court, does pay heed to the said problem but, insofar as the rule when taken in conjunction with Rule 17d of the Seventh Circuit requires the user of the cheaper type of pinted brief to forego one-half of his presentation, the said rules are unconscionable and in this case they effectively operated to deprive Petitioner of equal protection of the law and procedural due process of law.

CONCLUSION

For the reasons above stated, this petitioner has been denied his constitutional rights to a fair, impartial and legal proceeding during and after his trial and on his appeal.

It is, therefore, respectfully submitted that Certiorari should be granted and that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed, or in the alternative, that this Court should vacate said judgment and remand this cause to the United States Court of Appeals for the Seventh Circuit for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

WILLIAM C. ERBECKER
Attorney for Petitioner

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16532 September Term 1967 - April Session 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOE EDWIN MILLER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

May 24, 1968

Before Duffy, Senior Circuit Judge, Schnackenberg and Cummings, Circuit Judges.

Duffy, Senior Circuit Judge. Defendant was charged in one count of an indictment with violation of Title 18 U.S.C. Sec. 659, in that he had in his possession three color television sets and two R.C.A. speakers, knowing these chattels had been stolen while they were moving in an interstate shipment of freight and express.

Defendant filed a motion to suppress evidence based on his contention that the TV sets and speakers were seized in an unlawful search and seizure. The District Court denied the motion to suppress. On January 23, 1967, the jury returned a verdict of guilty.

The principal point argued on this appeal is that defendant did not consent to the search freely, knowingly and understandingly.

There is no dispute that on the day following the "hijacking" of a truck hauling goods in interstate commerce, FBI agents Cole, Waldrop, Cauthen and Muollo went to the door of the residence of defendant Miller. Agent Cole

acted as spokesman. When Miller opened the door, Cole identified himself and introduced the other agents. Each agent displayed his identification, Miller invited the agents into his home. They congregated in the living room.

Agent Cole told Miller the FBI had information that Miller had certain TV sets and radio speakers which had been stolen from an interstate shipment. Cole then advised Miller that he need make no statement but that if he did, it could be used against him. Cole also advised Miller that he had a right to talk to an attorney.

Defendant Miller then said——"Yes, I have some TVs and speakers in my garage which I bought from a fellow last night. Do you want to see them? I'll take you back there and show you." The agent said—"O.K." and they followed the defendant to the garage.

As Miller and the agents started toward the garage, they walked through the living room and through a den. Agent Cole said to Miller—"You know, Mr. Miller, you don't have to show us these things. We don't have a search warrant." Defendant Miller said—"Well, if they're stolen, I didn't know they were stolen. I have nothing to hide. You can look around all you want."

The agents did not make a search of the house or the remainder of the premises. While in the garage, they made a note of the serial numbers and models of the TV sets and speakers and ascertained they were among the goods that had been stolen from the truck-trailer.

There was nothing in the conduct of the FBI agents at Miller's home that was, in any manner, coercive. Defendant testified that the agents were very nice, polite and businesslike all of the time they were there.

There was nothing about the search that was unreasonable. As said by the Supreme Court—"The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

It seems clear that the agents, while in the Miller home, acted in a reasonable manner. Their initial suspicion that defendant had committed a crime was reasonable; their attempt to communicate with a United States Commissioner or the United States Attorney once their suspicion was confirmed, was reasonable. The source of their information had told the agents that Miller was trying to sell the TV sets and radio speakers at 2 o'clock that afternoon. With defendant making attempts to dispose of the stolen merchandise, time was of the esssence.

It is clearly established that no force or deception was used by the FBI agents. The District Court was correct in holding that the consent given by the defendant was voluntarily and intelligently made. United States v. Thompson, 356 F.2d 216, 220 (2 Cir., 1965); Simmons v. Bomar, 349 F.2d 365, 366 (6 Cir., 1965); United States v. Ziemer, 291 F.2d 100, 102-(7 Cir., 1961); cert. den, 368 U.S. 877 (1961); United States v. Jones, 204 F.2d 745, 749-50 (7 Cir., 1953), cert. den. 346 U.S. 854 (1954).

We hold that in this case there was a sufficient warning of defendant's rights under the Fourth Amendment. Cf. United States v. Nikrasch, 367 F.2d 740, 744 (7Cir., 1966).

We further hold that the decision of the District Court that defendant Miller voluntarily and freely consented to the search of his garage, is fully sustained by the evidence. It perhaps should also be noted that the agents did not conduct a search of defendant's home.

The defendant also argues that the trial court unduly prejudiced the jury in favor of the Government by its interrogation of the Government's witness, Michael Lee Bailey. This argument is without merit since the trial court was justified in questioning Bailey regarding his guilty plea entered in this criminal case. While the trial court should not assume the role as trial counsel, it may ask relevant questions of a witness. Since this witness testified that he pleaded guilty to get out of jail, it was proper for the trial court to ask the witness if he wanted his guilty plea set aside. Following the trial court's ques-

tions, defendant's attorney refused to continue cross examination of Bailey. The court suggested that defendant's attorney continue the cross examination. The defendant's attorney said—"The defendant declines to carry on the cross examination, Your Honor." After reading the testimony we conclude that the trial court's questions were asked in the furtherance of ascertaining the truth and were impartial.

We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court.

The judgment of conviction is

AFFIRMED.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 16532

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

JOE EDWIN MILLER,
Defendant-Appellant

Appeal From The United States District Court
For The Southern District of Indiana
Indianapolis Division

The Honorable William E. Steckler, District Judge

APPELLANT'S PETITION FOR REHEARING

The Appellant in the above-captioned matter prays for a rehearing of the above-captioned matter, calling the following matters to the Court's attention and presenting the following grounds:

1. It is respectfully submitted that the Court's opinion in this cause, with respect to the main proposition of law with which it concerns itself, is based upon an incorrect statement of the record. On page 2 of this Court's opinion, it is stated that:

> *There is no dispute* that on the day following the 'hi-jacking' of a truck hauling goods in interstate commerce, FBI agents Cole, Waldrop, Cauthen and Muollo went to the door of the residence of defendant Miller. Agent Cole acted as spokesman. When Miller opened the door, Cole identified himself and introduced the other agents. Each agent displayed his identification. Miller invited the agents into his home. They congregated in the living room.
>
> Agent Cole told Miller the FBI had information that Miller had certain TV sets and radio speakers which had been stolen from an interstate shipment. Cole then advised Miller that he need make no statement but that if he did, it could be used against him. Cole also advised Miller that he had a right to talk to an attorney. (Emphasis supplied)

Page Two of Court's Decision, first two paragraphs. On page 22 of the Appellant's brief, it is shown that there was indeed a dispute on the question of whether the FBI agents who entered the appellant's home introduced themselves as FBI agents before entering, and it was further disputed whether the appellant did invite them into his home as is shown at page 20 of the appellant's brief. Whatever reasons this Court may have had to disregard the aforesaid disputes which were raised by the appellant and to treat them as undisputed matters in its summary of the facts, it is submitted that the said mistake as to facts in issue is sufficient ground for a rehearing in and of itself, The matters raised in paragraph three hereinafter supplement the said ground.

In the light of the said mistake as to fact the appellant would again assert what was asserted at page 145 of his original argument in this matter, that is, that "In the instant case, it would have been a simple matter for the(se) four or five agents to have told the defendant the true nature of their business, criminal investigation, and that the law did not require him to participate in that investigation. These chose, however, to encourage

defendant's abdication (of his rights) by withholding this information from him, no doubt fearing that he would seek counsel and exercise his rights."

If the Court should be inclined for any reason to reject the argument submitted hereinafter in paragraph 3, it also should be noted that even the Appellee's Brief shows that the matter referred to in the first of the two above-quoted paragraphs of this Court's decision was hardly undisputed as the appellant contended that he had believed that the investigating agents were insurance men, not police officers, immediately before he "waived" certain valuable rights. This appears at page 24 of the Appellee's Brief.

2. With respect to the Appellant's attack upon the adequacy of the evidence presented by the government on its case in chief, this Court had only the following to say in its decision:

> We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court.
> Page Four of Court's Decision, last paragraph.

This amounted to a mere paraphrasing of the government's cursory reply on this point which appeared at page 30 of its brief:

> The defendant's other argument, that the jury convicted the defendant "upon suspicion and conjecture and nothing more", is simply absurd.
> Appellee's Brief, page 30.

The appellant respectfully urges that it is not "absurd" and that it does not constitute a "jury argument" to raise the question of sufficiency of evidence on appeal, even where it is evident that the jury heard a prima facie case.

Where a motion to suppress is at issue it is almost mandatory to do so because this Court, under Rule 52 of the Federal Rules of Criminal Procedure, will not reverse for harmless error. Where it is urged that certain evidence admitted at the trial was not legal evidence, it is more than appropriate to show further that there was not sufficient legal evidence to convict the appellant. To the extent that the legality of the evidence which the appellant sought to suppress in this cause must be reconsidered, the question of sufficiency likewise must be reconsidered.

3. Appellant's counsel is concerned that the number of pages in the appellant's argument caused this Court to decline to give consideration to the said argument. Counsel's concern is caused by the fact that the Court called the number of pages in the written argument to his attention in severe and vehement terms during the oral argument in this cause and by the fact that the opinion in this cause constitutes little more than a reiteration of the rationale expressed in the government's brief in this cause. On this point the appellant calls this Court's attention to page 32 of the appellant's brief and page 26 of the government's brief. These pages are selected for comparison because neither of them are broken up by indented quotes or headings and both are identical in format. Page 32 of the appellant's brief contains exactly 163 words while page 26 of the government's brief contains exactly 333 words, more than twice the number of words appearing on the comparable page of the appellant's brief. The Court's attention is further called to the fact that the appellant's brief consists of reproduced typing while the government's brief was prepared by the more expensive method, that of printing. Both briefs were consistent with the provisions of Rule 16 (f) and (g) of this Court, which said sections of Rule 16 read as follows:

> f. It shall not be necessary to print the record on appeal or on review. All appendices, briefs, or other papers printed for the use of the court, if produced by ordinary typographic methods, must be in such

form and size that they can be conveniently bound together so as to make an ordinary octave volume having pages 6⅛ x 9¼ inches and type matter 4 1/6 inches by 7 1/6 inches, except that appendices and briefs in patent cases may be printed in such size as is necessary to utilize copies of patent documents: viz., 7½ by 10 inches. They and all parts thereof, including index, list of authorities, footnotes and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type adequately leaded; and the paper must be opaque and unglazed.

g. In lieu of submitting a printed appendix or brief as prescribed by Rule 16 (a) and (f), a party may, at his option, reproduce the appendix or his brief or both by multigraph, or offset duplicating method. The record and brief so produced shall be on opaque unglazed paper, size 7½ by 10 inches, with margins of at least 1 inch, except that the left-hand margin shall be 1½ inches. No volume shall contain more than 300 pages. Each volume shall be neatly stitched on the left-hand side and have a cover on both front and back. Type matter shall be double-spaced except for quotations, which may be single-spaced and indented. The clerk shall refuse to accept for filing any copies which are not clear and readable.

The government's brief was consistent with, while the appellant's brief was not consistent with, the provisions of Rule 17 (d) of this Court which reads as follows:

d. Unless permission is obtained from the court or a member thereof, the clerk will not receive a brief of either party of more than 75 pages. The parties shall be referred to as "plaintiff" and "defendant."

The appellant believes it to be self-evident that Rule 16 (g) of this Court was adopted for the purpose of providing appellants of less than average means who are not paupers with the opportunity to present their appeals to this Court the same as appellants of average or better

than average means. The necessity for this alternate means of publishing a brief is readily apparent in view of the decision of the United States Supreme Court in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. But the rules of this Court, by limiting both types of brief to the same number of pages and requiring that all typing except quotes be double-spaced, require any appellant who would seek to have his brief published by the cheaper method to limit his argument to half the length of the argument which could be presented by a more prosperous appellant. These rules further limit a criminal appellant's argument to half the length of the government's argument unless the criminal appellant can afford to have his argument printed by the more expensive method as all government briefs are printed by the more expensive method regardless of the format of a criminal appellant's brief. The Appellant recognizes that the equal protection clause of the United States Constitution upon which the Supreme Court's decision in Griffin v. Illinois is based applies only to the states and not to the federal government, but it is submitted that the Ninth Amendment to the United States Constitution which provides that "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" taken together with a reading of the Constitution as a whole which shows no inclination to permit greater federal discretion in matters affecting the rights of individuals than is afforded to the states compels the conclusion that the federal government, including its courts, is as much obligated to provide equal protection to criminal defendants of different economic means as the states. In recognition of this, much has been done by the federal judiciary and by Congress to protect pauper defendants from being deprived of their rights by their impecunious state, but little or no heed has been given to the problems of those who, while

they are not paupers, necessarily must economize in undertaking an appeal. Rule 16 (g) of this Court, insofar as it provides an alternate and cheaper form for publishing a brief in an appeal to this Court, does pay heed to the said problem but insofar as the rule when taken in conjunction with Rule 17 (d) requires the user of the alternate form to forego one-half of his presentation, the said rules are unconscionable. For this reason, it is respectfully urged that this appeal should be reconsidered and the appellant's brief taken into consideration notwithstanding its length.

Wherefore, Appellant prays for a rehearing in this cause, for reversal of the judgment in the trial court below and for all further relief to which this Court may deem him to be entitled.

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William C. Erbecker
Attorney for Appellant

APPENDIX B-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16532 SEPTEMBER TERM 1967 — APRIL SESSION 1968

UNITED STATES OF AMERICA, *Plaintiff-Appellee* *vs.* JOE EDWIN MILLER, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

JUNE 26, 1968

Appellant's Petition For Rehearing is denied.

/s/ Cummings, J.
Cummings, J.

cc: MR. WILLIAM C. ERBECKER
Attorney-at-Law
707 Hornblower Building
129 East Market Street
Indianapolis, Indiana 46204

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 339

JOE EDWIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of knowingly possessing property stolen from interstate commerce, in violation of 18 U.S.C. 659. He was sentenced to imprisonment for one year and a fine of $2,500, the sentence of imprisonment to be suspended after two months were served with peti-

tioner to be placed on probation for the remaining ten months.[1] The court of appeals affirmed.

At a pretrial hearing on a motion to suppress, petitioner testified that on April 15, 1966, between 4:30 and 5:30 p.m., several F.B.I. agents arrived at his house in Indianapolis. Agent Cole showed his identification and introduced the other agents. Cole said that they understood petitioner had some television sets which had been stolen from an interstate shipment. Petitioner replied that he did have some television sets but, as far as he knew, they were not stolen. Cole asked to see them. Petitioner said "sure thing" and took them to the garage. After taking down the numbers on the cartons, the agents placed petitioner under arrest for possession of stolen goods (1 R. 7-8, 11-13). The agents were never threatening and were polite at all times (2 R. 22-24). Petitioner's wife gave substantially the same account of the agents' visit (1 R. 7-8).

F.B.I. agent Waldrop testified that he, Cole and two other agents went to petitioner's house on the day in question between 6:00 and 6:30 p.m. Prior to the visit the F.B.I. had learned of the disappearance of three Arvin color television sets and two RCA speakers from interstate shipments and had received confidential information from an informant that petitioner had some color television sets in his possession which he was trying to sell. Since the information about

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[1] The indictment and judgment of conviction are found in the unnumbered pages of Appellant's Appendix, hereafter referred to as "1 R.". The Appellee's Brief and Appendix is referred to as "2 R.".

petitioner had been received late in the afternoon and they were unable to reach a commissioner, they had gone without a warrant to petitioner's house. Petitioner invited them in. Cole warned petitioner of his rights and told him that they were investigating a theft from interstate commerce of color television sets and RCA speakers. When Cole asked petitioner if he had any of these items, he replied that he did, in his garage. He said that he had bought them from a man the previous night and asked if the agents would like to see them. As they were walking to the garage, petitioner said that, if they were stolen, he didn't know it and that they could look around all they wanted to, he had nothing to hide. Petitioner showed the agents five cartons, containing three Arvin color television sets and two RCA speakers. Stamped on the sides of the cartons were the addresses of the consignee and the sender (1 R. 1-5; 2 R. 14-20).

The court denied the motion to suppress, finding that petitioner had freely and intelligently consented to the search (2 R. 2-3).

The evidence at trial showed that on the night of April 14-15, 1966, the cartons later found in petitioner's garage disappeared from the parking lot of the ABC Forwarding Company in Indianapolis. The speakers were in transit from Indianapolis to Baltimore and the television sets from Columbus, Indiana, to Baltimore (1 R. 15-39). Co-defendant Bailey, who had pleaded guilty, testified that on April 14, 1966, he took the three color TV's and two RCA speakers, which he knew had been stolen, to the home of petitioner, whom he knew to be a buyer of stolen mer-

chandise. After some bargaining about price, petitioner bought them for a sum between $350 and $450. There was no bill of lading or shipping order for any of the items.[2]

ARGUMENT

The examination of the cartons in petitioner's garage was not a general exploratory search, but an examination of specific articles, made with the active assistance of petitioner. All the evidence, including that of petitioner himself, was to the effect that he freely and intelligently gave his consent thereto. Such a search is clearly valid. *United States* v. *Mitchell*, 322 U.S. 65, 70; *Gorman* v. *United States*, 380 F.2d 158 (C.A. 1); *Drummond* v. *United States*, 350 F.2d 983 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944; *Burge* v. *United States*, 332 F.2d 171 (C.A. 8), certiorari denied, 379 U.S. 883.

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[2] Petitioner, while denying that he knew the merchandise was stolen, again gave testimony as to the voluntariness of his consent to the search. He stated that on the day in question his little girl looked out the window and said that the insurance man was coming. Petitioner answered the door and met Cole, who identified himself and the other agents, who in turn showed their credentials. Cole said they understood that petitioner had some TV's stolen from an interstate shipment. Petitioner said that he did have some TV's but that they were not stolen. When the agents asked if they could see them, he said "Sure" and took them to the garage. They checked the serial numbers. One of the boxes was already open and they lifted one set out. Petitioner was not sure whether he helped them to do this or not. Cole asked petitioner if he wanted to make a statement and he said, "Sure, I'll do anything to help catch this guy." (1 R. 87-90).

The court of appeals—which discussed petitioner's other contention in some detail—properly held, without a prolonged discussion, that the evidence sustained a finding of guilt. The direct and positive testimony of co-defendant Bailey was alone sufficient for this purpose. It was corroborated by petitioner's possession of the recently stolen property and the admitted circumstances of its acquisition, which, to say the least, would be quite unusual for a *bona fide* transaction. While, contrary to petitioner's assertion, it was not necessary for the government to prove that petitioner knew the property was stolen from an interstate shipment, see *Pagliano* v. *United States*, 348 F.2d 902 (C.A. 1), the fact that the addresses of the consignor and consignee were stamped on the cartons did provide such proof.

In view of the lack of substance to petitioner's contentions, the fact that the court below wrote a three and one-half page opinion does not support his charge that the court of appeals ignored his 150-page brief. Indeed, the opinion itself shows that the court did consider the various contentions that he raised. Thus, there is no basis for petitioner's charge that the court discriminated against him because he was poor by not considering his brief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

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